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No. 02-321

Supreme Court, U.S.
FILED
OCT 1 2002
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In The

Supreme Court of the United States

MACHIPONGO LAND AND COAL CO., INC., VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, THE ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of the Department of Environmental Resources,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA COAL ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI FILED BY MACHIPONGO LAND AND COAL CO., INC., et al.

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CONSENT OF THE PARTIES

Petitioners and respondents have, pursuant to written consents filed with the Clerk of this Court, consented to the filing of this *Amicus Curiae* Brief by the Pennsylvania Coal Association ("PCA"), which is filed in support of the Petition for Writ of Certiorari filed by Machipongo Land and Coal Co. Inc. ("Machipongo"), the Victor E. Erickson Trust and Joseph Naughton ("Erickson/Naughton").[1]

INTEREST OF THE *AMICUS*

PCA is the trade association that represents the interests and serves as the voice of Pennsylvania's bituminous underground and surface coal mining industries. PCA's coal producing member companies produce more than 80% of the bituminous coal mined in Pennsylvania annually and produced more than 74 million tons of bituminous coal in 2001.

The most important asset of each coal producing PCA member company is its coal reserves. PCA member companies have, over many years, accumulated large blocks of mineable coal reserves. These companies have invested tens of millions of dollars to acquire title to and the right to mine this coal with the reasonable investment backed expectation that the coal can be mined. Without an

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for the *amicus curiae* states that *amicus curiae* and they were the sole authors of this Brief. No person or entity, other than PCA, made any monetary contribution to the preparation or submission of this Brief.

adequate reserve base, PCA coal producing companies cannot continue or expand operations to recover the enormous capital investment they have made in coal reserves and the equipment and facilities needed to mine these reserves.

PCA member companies are among the largest landowners in Pennsylvania, owning thousands of acres of subsurface coal reserves being actively mined and thousands of additional acres of coal reserves which will be mined in the future. Title to the vast majority of the coal has, in accordance with century-old, and well-settled principles of Pennsylvania property law, been severed from title to the fee estate and the coal is a separate estate in land. However, PCA member companies own relatively little surface land. Therefore, unlike most other landowners in Pennsylvania, the real property (in this case the coal located beneath the surface land of others) owned by PCA member companies has but one use and this property, subsurface coal, has value only if it can be mined. PCA member companies cannot, like other property owners, use this coal property for other purposes.

PCA and its member companies thus have a vital interest in any matter involving the issue of whether the Commonwealth of Pennsylvania can prohibit, without compensation, the one and only use that coal owners can make of their coal properties.

In addition, PCA member companies compete against coal operators in other coal producing states and have a direct interest in assuring that the "national" requirements of the Federal Surface Mining Control and Reclamation Act, ("SMCRA"), 30 U.S.C. § 1201, *et seq.*, are, to

the maximum extent possible, uniformly applied so that they can compete on a level playing field.

PCA is also the successor by merger of the Keystone Bituminous Coal Association, which was the Petitioner in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the holding of which was misconstrued by the Pennsylvania Supreme Court in the proceedings below.

SUMMARY OF ARGUMENT

The decision of the Pennsylvania Supreme Court raises issues of national, not local, importance and is in conflict with the only other significant decisions involving "unsuitable for mining" requirements imposed by SMCRA.

SMCRA imposes a national requirement in each state where coal is mined that state law designate specified lands, and the state regulatory authority be authorized to declare certain categories of lands "unsuitable" for coal mining activity. 30 U.S.C. §§ 1260(b) and 1272(a)(1).

As a result, there are "unsuitable for mining" regulations comparable to Pennsylvania's in each primacy state which must be applied in circumstances where, as is the case in Pennsylvania, title to the coal to be mined is held separately from title to the overlying surface property, which is typically owned by others. There is, therefore, a need for uniform national guidance on how to properly assess the impact of "unsuitable for mining" designations on the property rights of the nation's coal operators and mineral holding companies and, in particular, finally to develop a uniform test for defining the "relevant parcel" to

be considered in making these determinations. *See, Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S.Ct. 2448, 2465, 150 L.Ed.2d 592 (2001).

The impact of the regulatory unsuitability designation imposed by the Pennsylvania counterpart of Section 1272(a)(1) is indistinguishable from the impact of the statutory "unsuitability" designations imposed by 30 U.S.C. § 1260(b)(5), the impact of which was at issue in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed.Cir.), *cert. denied*, 502 U.S. 952, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991) and the impact of 30 U.S.C. § 1272(e)(2), which was at issue in *Stearns Co., Ltd. v. United States*, ___ Fed.Cl. ___, 2002 WL 2001280 (Aug. 5, 2002).

Although the Federal Circuit, the Court of Claims and the Pennsylvania Supreme Court were faced with the same task, deciding the proper test to apply when deciding whether an "unsuitable" for mining designation worked an unconstitutional regulatory taking of coal lands, the Courts applied starkly different tests. The existence of different tests for assessing the impact of what is, in reality, a national regulatory program, is an additional, and compelling, reason for this Court to grant this Petition for a Writ of Certiorari.

Finally, the Pennsylvania Supreme Court misconstrued this Court's holding in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THERE IS A COMPELLING NEED FOR A UNIFORM TEST TO DETERMINE WHEN UNSUITABLE FOR MINING REGULATIONS, WHICH ARE NATIONAL IN SCOPE, RESULT IN AN UNCONSTITUTIONAL REGULATORY TAKING OF PROPERTY.

SMCRA was enacted in 1977 for the purposes, *inter alia*, of establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and to encourage the full utilization of the Nation's coal resources. 30 U.S.C. § 1252(a) and (k). SMCRA grants the federal government national jurisdiction to regulate coal mining.

Under SMCRA any state wishing to assume exclusive regulatory jurisdiction, known as Primacy, over surface coal mining operations on non-federal lands within its borders must submit a proposed program of laws and regulations ("State Program") to the Secretary of the Department of the Interior for approval. The State Program must demonstrate that the state has laws providing for the regulation of surface coal mining in accordance with the provisions of SMCRA, regulations which are consistent with the Secretary's regulations issued pursuant to SMCRA, and that the state regulatory authority has the administrative and technical ability to enforce these standards. 30 U.S.C. § 1253.

If a state elects not to submit a State Program for approval by the Secretary, or fails to properly administer its State Program once approved, the Secretary must impose a Federal Program in that State which implements

the requirements of SMCRA and the Secretary's regulations implementing the Act. 30 U.S.C. § 1254.

As a result of SMCRA, the manner in which coal mining activities are regulated in this Country no longer varies significantly from state to state and Pennsylvania mine operators are not faced with the concern that operators in competing coal producing states may obtain a competitive advantage by operating under a regulatory program which is significantly less stringent than Pennsylvania's.[2]

Among the specific requirements of SMCRA, which must be in place in every coal producing state (whether operating under a State Program or a Federal Program), is a requirement that there be a regulatory procedure and regulatory criteria which authorizes interested persons to petition the regulatory authority to declare specific lands unsuitable for surface coal mining activity. 30 U.S.C. § 1272. Pennsylvania's regulatory procedures and criteria, which were applied in this case to preclude Petitioners from mining coal lands they own, are set forth at 25 Pa.Code §§ 86.121-86.130.[3]

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[2] SMCRA does allow each state to develop a State Program, which is more stringent that the requirements of SMCRA. 30 U.S.C. § 1201(f). Therefore, differences in regulatory requirements do exist. Nevertheless, for the most part, a mine operator in Pennsylvania faces basically the same regulatory obligations as mine operators in other jurisdictions.

[3] By way of example, the neighboring coal mining States of West Virginia, Ohio and Maryland have virtually indistinguishable regulatory requirements. *See* W.Va.C.S.R. § 38-2-19; OAC 1501:13-05 and 1501:13-07; and COMAR 26.20.11.01-.10. *See also* 30 CFR Part 762, which sets forth the federal regulations governing the procedures and criteria for designating lands unsuitable for surface coal mining

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Consequently, the regulatory program, the application of which was at issue in the court below, is in every respect a national regulatory program, which can also be applied to coal lands owned by PCA members in Ohio, West Virginia, or any other coal producing state.

For this reason alone, PCA submits the issue of the proper test to apply when determining if a particular unsuitability designation "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 399, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), should not vary from state to state. Similarly situated coal owners in, for example, Pennsylvania and West Virginia, whose coal lands have been declared unsuitable for mining, should not be treated differently because Pennsylvania courts apply one test to define the "regulated parcel" and West Virginia courts apply another.

Whether title to coal has been severed from title to the overlying surface land in Pennsylvania, West Virginia, Ohio, Maryland or Wyoming, it has value only if it can be mined and sold and the question of whether the national "unsuitability for mining" provisions of SMCRA completely destroy that value should be determined by uniform national standards, not local standards.

This case involves "land" and, as Justice Scalia, speaking for a majority of this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 790 (1992) stated, in "the case of

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activities in states where the federal Office of Surface Mining Reclamation and Enforcement is the regulatory authority. As noted, similar requirements exist in every state where coal is mined.

land . . . we think the notion . . . that the State may subsequently eliminate all economically valuable use is inconsistent with the historic compact recorded in the Takings Clause that has become part of our constitutional culture."

THE PETITION SHOULD BE GRANTED BECAUSE THE TEST ANNOUNCED BY THE PENNSYLVANIA SUPREME COURT FOR DETERMINING WHETHER AN UNSUITABLE FOR MINING DESIGNATION WORKS AN UNCONSTITUTIONAL REGULATORY TAKING IS IN CONFLICT WITH THE TEST APPLIED BY OTHER COURTS.

PCA's concern that similarly situated coal owners in other jurisdictions whose coal lands have been declared unsuitable for mining will be treated differently because courts with jurisdiction over takings claims in the several States will develop different tests to determine if a regulatory action has "gone too far," is already a reality.

In *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed.Cir.), *cert. denied*, 502 U.S. 952, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), the owner of coal lands which were deemed "unsuitable for mining" pursuant to 30 U.S.C. § 1260(b)(5), filed a Tucker Act Claim against the United States, alleging that the operation of this statutory unsuitability for mining designation resulted in a taking of its property. The impact of § 1260 on the property rights of the plaintiff in *Whitney Benefits* was indistinguishable from the impact of the "unsuitable for mining" regulation that was applied to Petitioners' coal properties in this case

– both provisions prohibited coal owners from mining their coal because of its location in areas deemed "unsuitable for mining."[4]

Nevertheless, the plaintiff in *Whitney Benefits* was found to be entitled to compensation even though it (like Machipongo) owned surface land overlying its coal because it was able to prove "that their [coal] interests lay within the boundaries of the prohibition and that they could not be mined by methods other than surface methods." 926 F.2d at 1173, citing *Skaw v. United States*, 740 F.2d 932, 938-940 (Fed. Cir. 1984). Thus, if Petitioners' coal lands were located in a state with a Federal Program or in Wyoming, the "relevant parcel" for purposes of defining whether an unsuitable designation had worked an unconstitutional taking of its coal lands would be "their interests within the boundaries of the prohibition;" and, it would be irrelevant that one of the Petitioners in this case (Machipongo), also owned some overlying surface lands because coal in Pennsylvania, like in all other coal producing states, is a separate estate in land, which has only one valuable use, namely, the right to mine and sell it. *Whitney Benefits*, 926 F.2d 1174.

In addition, two of the Petitioners in this case (Naughton/Erickson) do not own any surface land or other

[4] 30 U.S.C. § 1260(b) declares that mining is "unsuitable" within a statutorily defined area of the Western United States. The only difference between § 1260(b)(5) and the "unsuitability" provisions of 30 U.S.C. § 1272(a)(1), which are implemented by the provisions of the Pennsylvania State Program at issue in this matter, is that §1260(b)(5) expressly describes a specific area where mining is deemed "unsuitable" and the Pennsylvania State Program provisions, mandated by § 1272(a)(1), describe criteria to be applied to determine whether other areas can be declared "unsuitable for mining."

property within the "boundaries of the prohibition." Yet, in Pennsylvania (but not Wyoming or any state with a Federal Program) compensation was denied them because (like most other coal operators/owners) they also own coal that is outside the regulated area. This Court's teachings do not support a finding that no taking occurs if a regulation precludes within a regulated area the only use to which a property owner can put its property simply because the property owner owns other property, located outside the regulated area. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Nevertheless, this is precisely the inquiry which the Pennsylvania Supreme Court has mandated when resolving the issue of whether implementation of Pennsylvania's "unsuitable for mining" regulations based on the national unsuitable for mining regulations of SMCRA work a taking in Pennsylvania.

In addition, the Court of Claims in *Stearns Co., Ltd.*, did not examine whether the plaintiff owned other, unregulated surface or coal properties, adjacent or nearby the regulated area or "relevant parcel," or whether any right to use the surface remained despite application of the regulation, when concluding that the provisions of 30 U.S.C. § 1272(e)(2), which declare surface mining within national forests to be "unsuitable," worked a taking of the plaintiffs coal lands. That the Court of Claims saw no need to consider such an inquiry is significant because the Pennsylvania Supreme Court's holding, which does require Pennsylvania's courts to make such inquiries, would be the binding precedent in case that a PCA member company might bring alleging that another provision of Pennsylvania's "unsuitable for mining regulations," 25 Pa.Code § 86.102(4)-(5), which "prohibit" surface mining activities within State parks and forest lands, worked a taking of their property. There can be no justification for

awarding compensation to a Kentucky coal owner who is prohibited from mining beneath a National Forest while denying compensation to a Pennsylvania coal operator who is prohibited from mining beneath a State forest, where the source of the regulation involved in each case is the same federal statute.

PCA submits that this Court can properly assume that when Congress enacted the "unsuitable for mining" provisions of SMCRA and required each state to implement them, it did not intend to violate valid property rights or to effect takings. *National Wildlife Federation v. Hodel*, 859 F.2d 694, 750 (D.C. Cir. 1988). The Pennsylvania Supreme Court, however, by applying an overly restrictive takings test, clearly has a different assumption.

A requirement that a court examine the property rights of a coal operator or coal owner beyond or above the boundaries of the regulated or "relevant parcel" will not be required in any jurisdiction that adopts the analysis applied by the Federal Circuit in *Whitney Benefits,* or utilizes the approach of the Court of Claims in *Stearns Co., Ltd.*, and when a regulation is national in its application, there should be a uniform approach to determining the constitutional effect of its application.[5]

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[5] A requirement that all the property holdings of the regulated party must be considered or even those holdings which are "nearby" must be considered before a regulatory taking can be found will, PCA submits, favor small landowners over persons with large land holdings, a result totally at odds with [t]he concepts of 'fairness and justice' [which] . . . underlie the Takings Clause[ ]." *Palazzolo*, 533 U.S. at 633, 121 S.Ct. at 2466 (O'Connor, J., concurring). *See also* discussion in *Machipongo Land & Coal Co., Inc. v. Commonwealth, Dept. of Environmental Protection*, 719 A.2d 19 (Pa. Cmwlth. 1998) at page 27.

THE PETITION SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT MISCONSTRUED THIS COURT'S HOLDING IN *KEYSTONE BITUMINOUS COAL ASSOCIATION v. DeBENEDICTIS.*

It is apparent that the Pennsylvania Supreme Court rejected the approach taken by the Federal Circuit in *Whitney Benefits* (that the "extent" of the "relevant parcel" for takings purposes is defined by the property interest which is being regulated) because it misconstrued this Court's holding in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) as requiring it to ignore the fact that Pennsylvania law (like the law of all mining jurisdictions) recognizes the ownership of coal as a separate and distinct estate or property interest in the same parcel of land.

The Pennsylvania Supreme Court stated: "The U.S. Supreme Court has expressly rejected Pennsylvania's division of estates within a single parcel of land for the purposes of takings analysis." Pet. App. 30a.

This Court did not do so, nor could it have in *Keystone*. The issue before this Court in *Keystone* was not whether a regulation worked an unconstitutional taking in circumstances where the coal owner also owned overlying surface properties that it could put to some economically viable use other than mining.[6]

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[6] There was no evidence before the Court in *Keystone* as to whether or not any coal operator owned, in addition to the coal and support estates, any of the overlying surface.

Pennsylvania property law is unique. To PCA's knowledge, Pennsylvania is the only State which recognizes three (not two) separate estates in land. Like all coal producing states (including Wyoming, whose property law was at issue in *Whitney Benefits* and Kentucky, whose property law was at issue in *Stearns Co., Ltd.*), Pennsylvania recognizes that there can be two separate estates in the same parcel of land, namely, the surface and the mineral, each of which generally is acquired with different investment backed expectations. However, only Pennsylvania recognizes that there can be a third separate estate in land, which Pennsylvania calls the "support estate." The "support estate," while unique to Pennsylvania, is most easily understood to be an incorporeal interest in the amount of coal that must be left in place during mining to assure that the overlying strata (including the surface) do not subside as a result of mining. *Merrill v. Manufacturer Light & Heat Co.*, 185 A.2d 573, 576-577 (Pa. 1962). In Pennsylvania, each estate can be (although it typically is not) owned by a different individual. *Penman v. Jones*, 256 Pa. 416, 100 A. 1043 (1917); *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 304, 32 A.2d 227, 234 (1943).

Consequently, the issue which PCA's predecessor presented to this Court in *Keystone* was whether, on its face, a Pennsylvania statute, and implementing regulation, which prohibited coal operators, who owned both the coal and the support estates, from mining coal deemed by the statute to be necessary to support a specified but limited class of surface structures in the exercise of the property rights conferred by ownership of the coal and support estates, worked a *per se* taking. For the reasons set forth in *Keystone*, five members of this Court concluded that no *per se* taking had occurred.

This Court did not, however, hold that if a regulation had prohibited an operator from mining all his coal by exercising rights conferred by ownership of the support estate, recognized as such only by Pennsylvania law, and the coal estate, recognized by all mining jurisdictions, that before a taking could be found, a court was required to assess the extent of the coal operators other property holdings. This Court did not so hold because that issue was not before it, and this Court properly limited the focus of its inquiry to the effect of the challenged regulation on a Pennsylvania coal operator's **subsurface coal holdings**, not on its subsurface **and** surface land holdings.

If, as suggested by the Pennsylvania Supreme Court, a majority of this Court in *Keystone* found that the coal and support estates were not separate estates in land for purposes of its "takings analysis," that finding would have been inconsistent with this Court's long-standing precedent which holds that, for purposes of the Takings Clause, it is state law, not federal law, which defines "property." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).[7] There is not a word in *Keystone* which suggests that this Court intended to overrule this long-standing precedent.

A central focus of the inquiry in a regulatory takings case is on the extent to which a plaintiff's reasonable investment backed expectations have been frustrated by the regulation; and, in the case of any Pennsylvania coal

[7] Instead, because the coal operators in *Keystone* owned both the coal and the support estates, PCA submits this Court simply concluded that the "relevant parcel" was all the "coal" they owned at a given mine.

operator who acquired both the coal and the support estates, its investment backed expectations were the same for each estate – the expectation that it would be able to exercise the rights conferred so as to mine enough coal to recover a reasonable return on its investment. However, the investment backed expectations associated with a coal owner's acquisition of surface land, which it does not intend to use for mining purposes, will be completely different; and, its investment backed expectations in acquiring the coal estate can be completely frustrated without affecting at all its investment backed expectations in acquiring the surface.[8]

As discussed above, SMCRA imposes a nationwide requirement that every coal mining state adopt and enforce a program designating specified lands "unsuitable for mining." If courts in other jurisdictions faced with claims like those advanced by these Petitioners properly construe and apply this Court's holding in *Keystone*, coal owners in Pennsylvania will find themselves to be the only such property owners in the country to be denied compensation because they might, in addition to having invested

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[8] Moreover, PCA submits this Court would have reached a different conclusion in *Keystone* had petitioners owned only the "support estate," the overlying surface was owned by a second party and the coal estate was owned by a third party, a situation, which although exceedingly rare, can occur in Pennsylvania. In such a case, the sole reason the owner of support estate acquired it would be to sell it to the highest bidder – either the coal owner, so it be could be mined without impeding mining operations or the surface owner, so it could prevent removal of coal that would cause subsidence damage to the surface estate. In such a case, a regulation which eviscerated the rights conferred by ownership of the support estate would totally destroy the investment backed expectations of the person that owned only this "estate in land."

in the coal for purpose of mining it, also have invested in some overlying surface lands (or other mineral interests such as oil and gas) for some entirely different reason. The test announced by the Pennsylvania Supreme Court is clearly flawed.

In any state which recognizes that ownership of the coal is the ownership of a separate and distinct estate in land, which includes Pennsylvania,[9] the "relevant parcel" for purposes of a regulatory takings analysis must be, as the Federal Circuit in *Whitney Benefits* and Court of Claims in *Stearns Co., Ltd.,* correctly recognized, the estate which is affected by the regulation, in this and other "unsuitable for mining" cases, the coal estate.

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[9] It is clear that the Pennsylvania Supreme Court did not conclude that the "support estate" is no longer considered a separate estate in land for all purposes. It only concluded that for purposes of deciding a "takings" case this Court's decision in *Keystone* precluded it from otherwise applying the law of Pennsylvania. This latter conclusion was clearly erroneous.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari in this case should be granted.

Respectfully submitted,

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